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FILED

FEB 12 1988

JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1157

In The

ourt of the United States

October Term, 1987

A FEDERATION OF NATIVES,
OF VILLAGE COUNCIL PRESIDENTS,
nd TONY VASKA,

Petitioners,

vs.

AND WILDLIFE FEDERATION AND
CIL, INC., THE ALASKA FISH AND
ERVATION FUND, INC., FRANK L.
United States Fish and Wildlife Service,
COLLINSWORTH, Commissioner,
epartment of Fish and Game,

Respondents.

N FOR WRIT OF CERTIORARI TO
D STATES COURT OF APPEALS
R THE NINTH CIRCUIT

EF IN OPPOSITION

SH AND WILDLIFE FEDERATION
DOOR COUNCIL, INC., AND
H AND WILDLIFE CONSERVATION
FUND, INC.

OGAN, & HOLMES

he Alaska Fish and Wildlife Federation
l Wildlife Conservation Fund
SEL:
Gregory F. Cook
P.O. Box 618
Douglas, Alaska 99824
(907) 586-9719

714 S. Franklin, Suite Juneau, Alaska 99801 (907)586-1099

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TREATIES:

Convention for the Protection of Migratory Birds
1916, United States-Great Britain (on behalf of
Stat. 1702, T. S., No. 628.....4, 5, 6, 7

MISCELLANEOUS:

D. Raveling: "Geese and Hunters of Alaska's Y
Management Problems and Political Dilemmas,"
of the 49th North American Wildlife and Natura
Conference, Wildlife Management Institute, W
D.C., (1984).....

Letter from Don Collinsworth, to U.S. Departmen
October 12, 1981.....

Senate Report No. 1175, 95th Cong., 2d Se
reprinted in 1978 U.S. Code Cong. & Admin
7641-7645.....

USFWS: Pacific Flyway Report, Novem
pp. 5-6.....

Respondents, the Alaska Fish and Wildlife Conservation Fund and the Alaska Fish and Wildlife Federation and Outdoor Council (hereinafter referred to jointly as "the Conservation Fund"), respectfully request that this Court DENY the petition for a writ of certiorari which seeks review of the Ninth Circuit Court of Appeals' ruling in this case. The opinion of the Ninth Circuit is reported at 829 F. 2d 933 (9th Cir. 1987).

STATEMENT OF THE CASE

Hunting of migratory geese and the taking of eggs from nests during the spring nesting and rearing season in western Alaska is a significant factor contributing to the long term decline of four species of migratory waterfowl: Cackling Canada geese, White-fronted geese, Pacific black brant, and Emperor geese.[1]

The periods of mating, nesting, brood-rearing, and molting, when birds are reproducing or recovering from the stress of reproducing, are the times when hunting has the

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[1]SEE GENERALLY; D. Raveling, "Geese and Hunters of Alaska's Yukon Delta: Management Problems and Political Dilemmas," Transactions of the 49th North American Wildlife and Natural Resources Conference, Wildlife Management Institute, Washington, D.C., (1984).

The population declines for these four types of arctic nesting geese were so severe at the time this suit was filed that a computer regression analysis of the long-term population trend projected termination of the colonial nesting geese of the Yukon-Kuskokwim Delta in 1994. USFWS, Pacific Flyway Report, pp. 5-6 (November, 1983).

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Article II
Migratory
Stat. 1702,

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[3]"Here a
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birds for any
435 (1920).

ıe Conservation Fund brought this action against 'S and the state defendant in United States District Court g to enjoin the two government agencies from granting sion to kill geese during the closed season.

titioners intervened and filed a cross-claim against the l and state defendants, seeking to have spring and er hunting of nesting geese by Alaska Natives declared

n cross-motions for summary judgment, the District ruled that the 1925 Alaska Game Law ("1925 AGL") ed the 1918 Migratory Bird Treaty Act ("MBTA") r as MBTA had applied to Alaska. Thus, the court ed, USFWS was without authority to restrict waterfowl g by Alaska Natives.

n appeal by the Conservation Fund to the Ninth Circuit of Appeals, that court unanimously REVERSED the ct Court, holding that the Migratory Bird Treaty Act ns the hunting of migratory birds in Alaska and the A does not permit closed season hunting of migratory 829 F. 2d at 935.

etitioners now seek review of the ruling by the Ninth t Court of Appeals. The Conservation Fund OPPOSES tition.

REASONS WHY THE PE

1. The Court of Appe
Alaska Game Law
Federal Question;
the Migratory Bi
Repealed Confirms
of the Administrati
on Hunting Nestin
Principles of Wildli

A. The narrow, subst
instant petition is whether th
Pub. L. 65-186, 40 Stat. 75
1916 U.S.-Canada Conventi
Birds, was repealed by the
68-320, 43 Stat. 739 (1
migratory birds in Alaska.

Only if the answer to th
petition raise another narro
10 of the 1925 AGL surviv
Statehood Act, Pub. L. 85-
repealed earlier enactme
government.

The unanimous ruling
answered both questions in t

B. Review by the S
Appeals' decision in this ca
1925 Alaska Game Law, pr
the public and the courts ev
no way "an important federa
review.

Court of Appeals that the 1918
as not repealed by the 1925 AGL
ourt of Appeals' ruling confirmed
f the federal agencies vested by
manage and protect migratory
ose agencies have consistently
ory waterfowl by all persons,
s prohibited by the 1916 U.S.-
nplementing legislation, the 1918
5.

MBTA has applied throughout the
etitioners argued below that the
o the Territory of Alaska, both
oners' argument and held to the

t in that argument here. Instead,
TA was partially repealed by
exempting Alaska Natives from

question for review, petitioners
cape the burdens of the word
lly using that word. Instead,
sks whether subsequent to 1925,
taking of migratory waterfowl in
e phrasing may be cosmetically
e considerable burden of proving
the MBTA. It is a burden the

The Court of Appeals flatly held that hunting during the d season in Alaska is prohibited by the 1918 MBTA. As cated by the Circuit Court of Appeals, the 1925 AGL er explicitly nor implicitly repealed MBTA in Alaska. 829 d 942-945. This ruling by the Court of Appeals was pletely correct.

Article II of the 1916 U.S.-Canada Convention blishes a closed season on migratory waterfowl between ch 10 and September 1, annually. The MBTA adopts and ements the closed season provisions of that treaty. 16 C. 704.

No legitimate analysis of the 1925 AGL supports a partial al of the closed season rule of the MBTA. Nothing in the slative history of the 1925 AGL indicates that Congress nded in 1925 to repeal any part of the Migratory Bird ty Act. In its day, the MBTA was, in a legal sense, olutionary. It is inconceivable that Congress would ally repeal MBTA by implication in 1925 without a tilla of legislative history to that effect. Yet this is isely the argument petitioners entreat this Court to rtain.

Since 1918, and as recently as 1978, Congress has eatedly reaffirmed the closed season rule of the MBTA.[4] gress has steadfastly affirmed that waterfowl hunting may

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[4]A proposed Protocol Amendment to the 1916 U.S.-Canada vention was indefinitely deferred by the U.S. Senate due to "the near imous opposition of conservation groups in the United States and ada." SEE: Letter from Don Collinsworth, defendant herein, to U.S. artment of Interior, October 12, 1981.

occur during the times outside the closed season sions of the 1916 treaty. 829 F. 2d 940-942. It is ous for petitioners to argue that Congress intended the AGL, rather than the 1918 MBTA, to control the taking gratory waterfowl in Alaska. (Petition, p. 20.)

etitioners' central contention is that the prohibitions of BTA were repealed by Congress, silently and implicitly, denced by two portions of the 1925 AGL: a) Section 8 1925 AGL, 43 Stat. 743, which made it unlawful for rson to take "any game animal, land fur-bearing animal ild bird" in Alaska except as permitted by the Secretary riculture; and b) Section 10 of the 1925 AGL, which ized the Secretary to adopt regulations determining when w game animals, land fur-bearing animals, game birds game birds may be taken. (Petition at pp. 19-20.)

s petitioners intimate, a potential for overlap existed en the MBTA and the 1925 AGL in respect of migratory owl in Alaska. However, the two laws are easily read niously. Congress eliminated the latent ambiguity in the AGL by specifically stating its intent that the MBTA the controlling legal authority. Section 10 of the 1925 tates: "...nor shall any such regulation contravene any provisions of the migratory bird treaty Act and tions." 43 Stat. 744.

ne Court of Appeals analyzed the provisions of the 1925 and found no conflict with the MBTA. The Court of ls gave effect to the plain language of Section 10 that the ions of the MBTA may not be contravened. 829 F. 2d -943. The analysis by the Court was careful and stive, and it is manifestly correct. Its holding is rted by the cardinal rule of statutory construction that

on are not favored, Watt v Alaska, 451
d will not be found unless the intent to
nequivocal. Rodriguez v United States,
'), 94 L. Ed. 2d 533.

licy against repeal by implication is of
en, as here, the purported repeal would
protections for wildlife established under
EE: Andrus v Allard, 444 U.S. 51, 62, n.
will not be deemed abrogated or modified
less the intent of Congress to do so has
ed. Cook v United States, 282 U.S. 102
sely the contrary appears. Congress has
ted that MBTA has always been the
r migratory birds in Alaska.[5]

do not develop their second question, viz.,
rovisions of the 1925 AGL survived
958 Alaska Statehood Act. The Court is
ent edition of 48 USCA 191-213, which
in view of the admission of Alaska into

sertion That the Court of Appeals Was
sdiction to Determine the Secretary's
r the 1978 Amendment to the MBTA Is
an Assertion That the Ruling Was *Obiter*

C 3125, the 1980 Alaska National Interest Lands
815 (4): "Nothing in this title shall be construed
ng...the Migratory Bird Treaty Act." SEE ALSO:
he 1978 amendment to the MBTA, S. Rep. No.
Sess., reprinted in the 1978 U.S. Code Cong. &
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14-15.

rs assert that the Court of Appeals opinion when it construed the authority Interior to adopt regulations permitting erfowl during the closed season. This reversal by petitioners, for it was their the District Court which sought a ly the point which petitioners now say ssible advisory opinion. One speculates ave taken a more hospitable view if the g had been favorable.[6]

se the concepts of jurisdiction and er courts possessed subject matter case. Indeed, the determination by the he Conservation Fund has standing has petitioners.

on that the Court of Appeals should not cretary of Interior's authority under the the MBTA is nothing more than an ion of the Court of Appeals is *dictum*. hat petitioners are correct, they are not g that point in other forums. But it is ted States Supreme Court to stand as a ces of *dicta* by lower courts.

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the facts to this Court by stating that the 16 USC 712 was not briefed or argued to the tion at p. 21.) The contrary is true. The ed and argued orally that the 1978 MBTA ng to the closed season provisions of the 1916 SEE: Brief for Plaintiffs-Appellants, p. 34, and Reply Brief for Plaintiffs-Appellants, pp.

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reviewed the 1978
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ust be in accord with
uch time as the 1916
F. 2d at 940-942.

The ruling of the Cou
dictum, and it is correct.

In short, the 1916 U
Protection of Migratory Bir
the hunting season from M
in order to protect nesting w
closure has never been re
Congress has periodically r
alter the closed season.
opinion in the seminal case
416, 435 (1920) is just as v
decades ago: without the pr
soon be no migratory birds

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For these reasons, the
should be DENIED.

DATE: February 9, 1988

Respectful

William B
FAULKNE
Attorney o
Wildlife C
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Holland, 252 U.S.
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MBTA, there might

writ of certiorari

OOGAN & HOLMES
Alaska Fish and
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